IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 1427 OF 2007
with
WRIT PETITION NO. 1428 OF 2007.

Sneha Developers ....Petitioner
V/s
Ayyub Usman Gani Patvekar & Anr. ....Respondents.

Mr.V.A.Shastry, Adv. For the petitioner.

Mr.U.P.Warunjikar, Adv. For the respondent No.1.

Mrs.M.H.Mhatre, APP for the State.

CORAM: A.P.DESHPANDE, J.
18/12/07

PC:

Rule.

Rule made returnable forthwith.

Taken up for final hearing by consent of both the parties.

The present petitioner-complainant before the trial Court has filed a complaint under section 138 of the Negotiable Instruments Act against the respondent No.1. By the present petition the petitioner takes an exception to an order passed by 6th J.M.F.C., Pune dated 7.5.07 rejecting the application filed by the petitioner-complainant for leading secondary evidence on the ground that the original documents were handed over to the Advocate who was conducting the case in the trial Court and after the death of the advocate the original documents could not be traced by the person manning the office of the deceased advocate and/or his family

members. There are four documents in regard to which the petitioner is seeking to lead secondary evidence. The said documents are; original written envelope of demand notice, postal receipt, acknowledgment and postal certificate. It is the case of the petitioner that at the time of filing complaint he had handed over the said original documents to his advocate Shri S.P. Anand. The true copies of these four documents were placed on record of the trial Court by the deceased advocate himself during his life time. As despite search of documents in the office of the deceased advocate the original documents could not be found or traced an application came to be filed by the petitioner seeking permission to lead secondary evidence as the petitioner had complied with the requirement of section 65 (c) of the Evidence Act. The trial Court has rejected the application on the ground that the affidavit does not state that the original documents were given in custody of late advocate and also on the ground that on loss of documents no complaint had been filed with the police. Reading of the application in its proper perspective leaves no room of doubt that the petitioner had contended that he had handed over the original documents to advocate during his life time and copies of the said documents were placed on record by same advocate during his life time. I have no iota of doubt that the petitioner- complainant has satisfied the condition contained in section 65 (c) of the Evidence Act for leading secondary evidence. Denying the permission to the complainant to lead secondary evidence is bound to result in miscarriage of justice. Learned advocate appearing for the

respondent No.1 has opposed the writ petition by reiterating sthe contention that there is nothing on record to substantiate the contention of the petitioner that the original documents were handed over to the advocate during his life time. As observed by me above, the reading of the application in its entirety clearly reveals the fact that the original documents were handed over to the advocate and copies of the said documents were placed on record by the same deceased advocate. It is also contended by learned advocate for the respondent that the complainant has been delaying the trial of the complaint by not filing affidavit of examination in chief. The reason for non filing of the affidavit is obvious. Unless and until the application for leading secondary evidence is allowed the complainant cannot be expected to file appropriate affidavit of examination in chief. In the result writ petition is allowed. The impugned order dated 7.5.07 passed by the 6th J.M.F.C., Pune is quashed and set aside. Application moved by the petitioner under section 65 of the Evidence Act seeking permission to lead secondary evidence is allowed and the permission is granted to lead the secondary evidence. As the complaint is pending for almost about six years I deem it appropriate to direct the complainant-petitioner to file affidavit of his examination in chief within a period of two weeks from today and the trial Court shall proceed to try and decide the case as expeditiously as possible preferably within a period of four months from today. Rule made absolute in above terms.

18.12.07